PERWAJA STEEL SDN BHD v. MENTERI SUMBER MANUSIA MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: 25-339-12-2015]
25 NOVEMBER 2016

EMPLOYMENT LAW: *Jurisdiction – Industrial Court – Claimants terminated from employment – Claimants not seeking reinstatement – Whether Industrial Court has jurisdiction over matter – Whether Minister correct in referring representation of claimants to Industrial Court – Industrial Relations Act 1967, s. 20*

INDUSTRIAL COURT: *Jurisdiction – Claimants not seeking reinstatement – Whether Industrial Court has jurisdiction over matter – Whether Minister correct in referring representation of claimants to Industrial Court – Industrial Relations Act 1967, s. 20*

The applicant issued one 'Notis Pembayaran Gaji Lewat' which informed its workers in its plant in Kemaman that the applicant was, *inter alia*, facing severe financial complications and had to carry out restructuring exercise of its operation and the composition of its debts. This was followed by a 'Notis Pemberhentian Kerja' five months later ('the first notice') and another notice informing the workers in Kuala Lumpur that the contents of the first notice were applicable to all of them as well. The Industrial Relations Department notified the applicant that the Minister ('the first respondent') had referred 47 batches of representations made by the applicants' workers to the Industrial Court for an award under s. 20(3) of Industrial Relations Act 1967 ('the IRA'). After attending a case management at the Industrial Court, the applicant sought clarifications from the Industrial Relations Department on the grounds of the first respondent referral of these representations. According to applicant, at the Industrial Court, several claimants stated that they were not seeking reinstatement; and this position was in line with the applicant's position that the applicant's workers could not be reinstated to their former employment as the operations, business and place of work of the applicant had shut down. In this application for judicial review pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ('the ROC'), the applicant sought an order to quash the decision of the first respondent and an order of *mandamus* to direct the first respondent not to refer the representation of the respondents to the Industrial Court under s. 20(1) of the IRA in respect of the dismissal of the respondents.

Held (allowing application):

(1) Once there is no room for reinstatement, the Industrial Court ceases to have jurisdiction to hear the matter. The first respondent should have considered the specific issue of the Industrial Court's jurisdiction and whether or not it could have granted the remedy of reinstatement. (paras 22 & 25)

(2) As the first respondent had taken the position that the workers had informed the first respondent about the fact that they discharged from the applicant's employment *via* the first notice, it must follow that the first respondent had sight of the said notice. This clearly showed that all the necessary facts were before the first respondent to necessitate its consideration about the second respondent's jurisdiction. (para 26)

(3) There was no evidence from the first respondent to state that the workers had actually sought reinstatement during the conciliation meetings. The affidavit in support of respondents did not state their position that they actually sought reinstatement with the applicant. In fact, the affidavit in support of the 11th respondent showed that his complaint was about alleged unpaid salaries and not that he was seeking reinstatement with the applicant. (paras 27 & 28)

Case(s) referred to:

Abd Razak Embong & Satu Lagi v. Metro Pacific Sdn Bhd [2008] 2 LNS 1982 ***(dist)***
Holiday Inn, Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Kathiravelu Ganesan v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***
Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216 SC ***(refd)***
Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
R v. Secretary of State For Trade and Industry, ex p Lonrho plc [1989] 1 WLR 525 ***(refd)***
Unilever (M) Holdings Sdn Bhd v. So Lai & Anor [2015] 3 CLJ 900 FC ***(refd)***
Yeoh Thiam Poh v. Plas Industries Sdn Bhd; Prolexus Berhad (Second Party) [2012] 2 LNS 0037 ***(dist)***

Legislation referred to:

Companies Act 1965, s. 176
Industrial Relations Act 1967, s. 20(1), (3)
Rules of Court 2012, O. 53 r. 3(2)

For the applicant - B Thangaraj, M Nalani & Sharifah Nurul Atiqah; M/s Thomas Philip
For the respondents - Mohan Ramakrishnan; M/s Ramakrishnan & Assocs
Ayu Rohaiza Khazali; DPP

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicant, Perwaja Steel Sdn Bhd filed a judicial review application pursuant to O. 53 r. 3(2) of the Rules of Court 2012 for an order to quash the decision of the first respondent ("the Minister") and for an order

of *mandamus* to direct the first respondent not to refer the representations of the respondents to the Industrial Court under s. 20(1) of the Industrial Relations Act 1967 in respect of the dismissal of respondents.

The Parties

[2] The applicant is a national steel producing company that was established since the 80s.

[3] All the respondents were working with the applicant until they were terminated.

The Background Facts

[4] The background facts are as follows.

[5] On 13 June 2014, the applicant issued one "Notis Pembayaran Gaji Lewat" which informed its workers in the applicant's plant in Kemaman, Terengganu of the following:

(i) That the applicant was currently facing severe financial complications resulting in its inability to operate;

(ii) As a result of those financial complications, it is not a disputed fact that the applicant had to carry out a restructuring exercise of its operations and the composition of its debts under s. 176 of the Companies Act 1965.

(iii) The applicant confirmed that it would pay the workers a reduced salary for about five (5) months despite there being no more work at the applicant's plant. The applicant's workers were still, however, required to report to their place of work even though there was no work and/or duties to be performed at that time.

[6] Subsequently, on 17 November 2014, the applicant then issued a "Notis Pemberhentian Kerja" to all the workers, informing them of the following:

(i) The applicant will shut down its operations permanently by reason of the closure of its business and that the applicant had informed them of the decision to dismiss all of the workers from the applicant's employment during a meeting dated 13 November 2014 between the applicant's management and the worker's representatives in Kemaman, Terengganu; and

(ii) That five (5) of the workers' representatives then formed a committee to liaise with the applicant's management on the compensation scheme to the applicant's workers in Kemaman.

[7] On 27 November 2014, the applicant then issued a second notice informing all of the applicant's workers in Kuala Lumpur that the contents of the first notice dated 17 November 2014 were also applicable to all of the applicant's workers in Kuala Lumpur.

[8] On 5 October 2015, the Industrial Relations Department then notified the applicant that the first respondent had referred 47 batches of representations made by the applicants' workers to the second respondent for an award under s. 20(3) of the Industrial Relations Act 1967.

[9] On 3 November 2015, the applicant then received notices from the second respondent requiring the applicant's attendance at the first case management in the second respondent on 25 November 2015 and 26 November 2016.

[10] After attending the said case management, the applicant's solicitors then wrote to the Industrial Relations Department to seek clarification on the grounds of the first respondent's referral of these representations. In this regard, the applicant raised the following issues:

(i) that during the case management at the second respondent on 25 November 2015 and 26 November 2015, the applicant's solicitors was informed by several of the claimants in the second respondents that they were not seeking reinstatement under s. 20(3) of the Industrial Relations Act 1967; and

(ii) that this position was in line with the applicant's position that the applicant's workers could not be reinstated to their former employment as the operations, business and place of work of the applicant had shut down.

[11] The first respondent did not dispute the applicant's statements that several workers of the applicant did not seek reinstatement under s. 20(3) of the Industrial Relations Act 1967.

Issue

[12] The main issue to be considered by the court is whether the Industrial Court has jurisdiction to hear the dispute between the applicants and the respondents.

Decision

[13] In gist, the applicant's issue with the first respondent's references of these cases to the second respondent is that the first respondent failed to consider the full factual matrix which surrounded these matters and had also committed a serious misdirection in law in failing to consider the jurisdictional limits imposed on the second respondent before referring these matters to the Industrial Court.

[14] In this regards, learned counsel for the applicants contended that the decision of the Minister to refer the disputes to the Industrial Court pursuant to s. 20(1) of the Industrial Relations Act 1967 is based on two main grounds:

(i) The first respondent only took into account the facts and documents which were raised by the third to the 22nd respondent workers during the conciliation meetings and internal investigations in its referral of the workers' representations to the Industrial Court;

(ii) Because the applicant did not attend the conciliation meetings fixed on 17 February 2015 and 9 March 2015, this court must give the 'benefit of doubt on balance of probabilities' to the respondents.

[15] In support of his contention, learned counsel for the applicants relied on the case of *Kathiravelu Ganesan v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 2 MLJ 699 and *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9.

[16] The respondent workers relied on the following grounds to oppose the applicant's application:

(i) that the respondent workers were not informed or updated as to the reasons and decision of the applicant in the restructuring of the applicant;

(ii) the respondent workers state that the whole process of dismissal was not done in a 'transparent manner' and neither were they 'consulted' by the applicant; and

(iii) the Industrial Court is seized with the power to award compensation *in lieu* of reinstatement should it find that reinstatement is not the proper remedy, and as such, the Industrial Court would be in a 'position to adjudicate upon the reference by the Minister'.

[17] The first respondent relied on the case of *Yeoh Thiam Poh v. Plas Industries Sdn Bhd; Prolexus Berhad (Second Party)* [2012] 2 LNS 0037 and *Abd Razak Embong & Satu Lagi v. Metro Pacific Sdn Bhd* [2008] 2 LNS 1982 in support of its reasons to refer the representations to the Industrial Court.

[18] It must be noted that the cases relied on by the first respondent with regards to the non-attendance of parties pertain to proceedings which are already on-going in the Industrial Court itself, and not decisions to refer (or not to refer) by the Minister of Human Resources. Hence in my view those authorities are not applicable to the facts of this present case.

The Law

[19] Section 20 of the Act provides as follows:

20. Representations on dismissal

(1)

Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(1a)

The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

(2)

Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

(3)

Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

(4)

Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

(5)

This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under subsection 59(1); where, while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before court in respect of an offence under subsection 59(1), the proceedings under this section shall not be proceeded with further.

(6)

In any proceedings under subsection (2):

(a) an employer may:

(i) represent himself or be represented by his duly authorised employee

(ii) where he is a member of a trade union of employers, be represented by any officer or employee of such trade union of employers; or

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of employers registered in Malaysia (not being a trade union of employers); and

(b) a workman may:

(i) represent himself

(ii) where he is a member of a trade union of workmen, be represented by any officer or employee of such trade union of workmen; or

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of workmen registered in Malaysia (not being a trade union of workmen).

(7)

Save as provided in subsection (6), a workman or employer shall not be represent by an advocate, adviser, consultant or by any other person whatsoever.

(8)

For the purpose of carrying out his functions under this section the Director General:

(a) shall have the power to direct either party to furnish to him, within such period as may be specified in that direction, such information as he may consider necessary or relevant; and

(b) may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the dismissals to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction.

(9)

Where a workman who has made a representation under subsection (1) attends none of the conferences under paragraph (8)(b) without any reasonable excuse, the representation shall be deemed to have been withdrawn.

[20] The scope of s. 20(3) was discussed by the Court of Appeal in the case of *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 whereby the court referred to the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 which held as follows:

> The minister's discretion under s. 20(3) is wide, but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court, unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

Whether The Industrial Court Has Jurisdiction To Hear The Dispute Between The Applicants and The Respondents

[21] The law on the jurisdiction of the Industrial Court in relation to dismissal was discussed by the court in the case of *Holiday Inn, Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 where Haidar J (as he then was) held as follows:

> As stated by me earlier, the respondent in her representation initially wanted reinstatement which is in accordance with s. 20(1) of IRA but subsequently in the hearing before the Industrial Court, she changed her stand and instead asked for damages in lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provision of s 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have jurisdiction.

[22] Learned counsel for the respondent workers' position is that the Industrial Court has the jurisdiction to adjudicate on the workers' representations as it can award compensation *in lieu* of reinstatement. On this issue I accept the applicant's submission that once there is no room for reinstatement, the Industrial Court ceases to have jurisdiction to hear the matter.

[23] In the case of *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900 the court held that:

> From the phrase "compensation *in lieu* of reinstatement", it is our judgment that the element of compensation will only arise when the employees is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s. 20(1) of the IRA 1967, where the primary remedy of such a presentation to the Director General is for the workman "to be reinstated in his former employment"… After all, reinstatement is a

A statutorily recognized form of specific performance can only be ordered in a situation where the legal basis for such performance does not exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: "*lex non cogit ad impossibilia*", ie the law does not compel the impossible.

B **[24]** The affidavit evidence of the first respondent shows the following:

(i) that the first respondent was facing severe financial difficulties which hindered and subsequently disabled it from sustaining its operations and the place of work of the workers;

C (ii) that on 13 June 2014, the workers were put on notice and were at all material times, aware that they would receive late payments of their salaries in the view that the applicant's operations and business would recover and resume upon a restructuring exercise by the applicant; and

(iii) that on 17 January 2014, the applicant could not sustain its operations and had to therefore close down its entire operations and the place of work of the workers.

D

[25] In view of the aforesaid facts, in my view the first respondent should have considered the specific issue of the second respondent's jurisdiction and whether or not it could have granted the remedy of reinstatement. The E absence of any evidence that the first respondent had considered this point shows that this issue of jurisdiction was not considered. (See *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216; [1992] 2 MLJ 341 (referring to the case of *R v. Secretary of State For Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525).

F **[26]** As the first respondent has taken the position that the workers had informed the first respondent about the fact that they were discharged from the applicant's employment on 17 November 2014, it must follow that the first respondent had sight of the "Notis Pemberhentian Kerja" dated 17 November 2014. This clearly shows that all the necessary facts were G before the first respondent to necessitate its consideration about the second respondent's jurisdiction.

[27] Further, I find that there is no evidence from the first respondent to state that the workers had actually sought reinstatement during the conciliation meetings. In fact the affidavit in support of the 11th respondent H in Suit 359 clearly shows that his complaint is about alleged unpaid salaries, and not that he is seeking reinstatement with the applicant.

[28] I also find that the affidavit in support of all the other respondents does not state their position that the respondents actually seek reinstatement with the applicant.

I

[29] It is pertinent to note that in this present case there is no dispute about the applicant's financial situation and its closure of operations and the place of work of the workers.

[30] There is also no evidence that the workers, during the conciliation meetings had contended that there was bad faith or invalidity on the applicant's part in the closure of the applicant's operations.

Conclusion

[31] Based on the above reasons, the applicant appeal is allowed.